NO. 92-168

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

ROY H. WARREN

Petitioner

versus

SECRETARY OF HEALTH
AND HUMAN SERVICES

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF ISSUES

THE TWO QUESTIONS TO BE DECIDED ARE:

(1) Whether a mistake in fact incorporated in the Court of Appeals decision was material to the decision of the Court, and

(2) Whether an agency can write and interpret regulations in direct conflict with the statutes and the intent of Congress, and whether a Federal agency can require a claimant to follow over technical interpretation of a regulation and not, when less favorable to the agency, be required to follow them themselves.

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UNITED STATES SUPREME COURT

ROY H. WARREN
Plaintiff-Appellant

v, Docket #_____

SECRETARY OF HEALTH
AND HUMAN SERVICES
Defendant-Appellee

WRIT OF CERTIORARI

OPINIONS BELOW

The Social Security Administration, after a hearing by an Administrative Law Judge and appeal to the Appeals Council, adopted the Administrative Law Judge's position in this matter and found that the Petitioner was not entitled to Social Security Retirement Benefits because he did not have the required quarters of coverage to qualify for these benefits.[1]

The Magistrate for the United States District for the Western District of

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[1] **See Appendix 3. Final Determination of the Department of Health and Human Services.**

Tennessee recommended to Judge Turner, United States District Court Judge, that this case be dismissed stating that the Claimant was not entitled to Social Security Retirement Benefits because he was not entitled to use World War II wage credits because he had been determined to be eligible for and paid retirement benefits from the Civil Service Board.[2]

Judge Turner agreed with the Magistrate and after correcting the factual background stated that the regulations as interpreted by the Secretary of Health and Human Services (Secretary) were substantially based on the statutes and the language of the statutes and regulations on their face

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[2] **See Appendix 2. REPORT AND RECCOMMENDATION of Magistrate Allen**

denied Mr. Warren these benefits and he dismissed the complaint[3]

The United States Court of Appeals for the Sixth Circuit Agreed with this opinion[4]

JURISDICTION

This case Comes to this Court on a request for a Writ of Certiorari to the Sixth Circuit Court of Appeals by Rule 11 of the United States Supreme Court.

STATEMENT OF THE CASE

This case is brought before this Court for review from the Sixth Circuit Court of appeals who on April 20, 1992[5], interred an order affirming the dismissal of the above captioned case by the United

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3 **See Appendix 4. ORDER ON OBJECTIONS TO THE MAGISTRATE'S REPORT AND RECCOMMENDATION.**

4 *See Appendix 1*

5 ROY H. WARREN v. SECRETARY OF HEALTH AND HUMAN SERVICES Docket # 91-5514. A copy of which is attached to this opinion (Appendix 1)

States District Court for the Western District of Tennessee on March 27, 1991, Judge Turner presiding[6]. That dismissal affirmed the decision of the Secretary of Health and Human Services that Mr. Warren was not fully insured and eligible for retirement benefits under the Social Security Administration as a result of his application for retirement benefits on October 8, 1986[7].

The two questions to be decided are (1) whether a mistake in fact incorporated in the Court of Appeals' decision was material to the decision of the Court, and (2) whether an agency can write and interpret regulations in direct

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6 ROY H. WARREN v. OTIS W. BOWEN, SECRETARY, Doc. # 888-2502-TuA. A copy of the opinion is attached to this petition (Appendix 4)

7 See the decision of the Administrative Law Judge, Timothy O'Leary. See Appendix 3

conflict with the statutes and the intent of Congress.

This Case, if left alone by this Court, would also allow a conflict to exist between federal courts as to how the questioned regulations and statutes should be interpreted.

This Case arose when Mr. Warren was denied retirement benefits by the Social Security Administration because he did not have the required quarters of coverage to qualify for benefits. The Social Security Administration (Administration) determined that his time in the Navy during World War II could not be used to bring the number of quarters of coverage to the required level. The Administration determined that because Mr. Warren had been paid by the Civil Service Board benefits they had used the World War II time to calculate benefits and he was no longer entitled to use

those quarters for Social Security benefits. If Mr. Warren had in any way initiated or even acquiesced in the determinations of the Civil Service Board this opinion would agree with all other court decisions that address this situation.

Mr. Warren was employed by the Corps of Engineers when he was totally disabled through an on the job injury. He was entitled to and applied for civil service disability. This benefit did not depend in any way on the time he spent in the service during World War II. Instead of paying him 75% of his pay as disability as he was entitled to under the plan, he was paid 33% of his pay through the Civil Service annuity plan. Mr. Warren appealed this decision and was determined to be entitled to disability. All money paid him incorrectly was refunded.

The Court of Appeals states in its opinion of April 20, 1992, that apparently Mr. Warren applied for Civil Service benefits when his disability was terminated in 1983.[8] This is a repeat of a finding made by the Magistrate at the District Court prior to Judge Turner's decision to dismiss.[9] It must be strongly emphasized that the Magistrate's opinion of the facts was repudiated by Judge Turner's decision.[10] Judge Turner found no evidence to substantiate the Magistrate's finding in this regard and found that absent evidence to the contrary, Mr. Warren's

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[8] See the third full paragraph on page two of the Sixth Circuit Court of Appeals Opinion attached as Appendix 1.

[9] See Paragraph 2, page 3, of Magistrate Allen's REPORT AND RECOMMENDATION which is attached as Appendix 2.

[10] See Objection I: The court relies upon a material factual error found on page 1 and 2 of Judge Turner's opinion which is attached to this opinion as Appendix 3.

sworn testimony before the Administrative Law Judge was controlling as to the facts.

Mr. Warren stated under oath and documents later located and brought to the attention of the Court verify that Mr. Warren did not apply for Civil Service Benefits. These benefits were assigned him by the administration. When they were assigned to Mr. Warren he appealed the decision and Mr. Warren was found to be correct. All benefits incorrectly paid Mr. Warren were repaid to the Civil Service board in full on both occasions.

REASONS FOR GRANTING

The opinion of the Sixth Circuit Court of Appeals flies in the face of the controlling issue as determined by the Eighth Circuit Court of appeals. In

Taylor v. Gardner[11] that court found the controlling issue to be whether the veteran had made a competent choice. The veteran's family was allowed to disclaim the Civil Service benefit in favor of the Social Security benefit because the veteran was incompetent when the choice had been made prior to his death. This is the only case found that deals directly with retirement benefits at the Court of Appeals level and it clearly turns on the choice the veteran made.

Other cases at the District Court level seem to follow this same reasoning. In Southerland[12] and in Moncrief[13] retirement benefits were denied because a competent choice to except the benefits

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11 Taylor v. Gardner, 393 F.Supp 257

12 Southerland v. Flemming, 189 F.2d 712.

13 Moncrief v. Folsom, 233 F.2d 471.

had been made by the veteran and even though no payments had been received prior to his death, the estate was bound by that decision.

In Mr. Warren's case it is clear that Mr. Warren made a choice which he was entitled to by law. This choice was ignored by the Civil Service Board and Mr. Warren was arbitrarily and incorrectly placed in the wrong program. Now the Administration seeks to use this mistake to deny Mr. Warren the benefits he would be entitled to had it not been for the mistake made by the government.

The Court of Appeals states in its opinion that Mr. Warren is still entitled to use the quarters of coverage earned in the Navy during World War II under the Civil Service plan. This is meaningless because of Mr. Warren's disability. He would be required to give up his disability plan which he is clearly

entitled to in favor of a much lower benefit plan through the Civil Service Board. The Civil Service Board will not allow Mr. Warren to draw benefits from retirement and disability plans. Mr. Warren is now being penalized for his time in the service during World War II. This is clearly against the intent of Congress.[14]

The Sixth Circuit and all the opinions below in this case try to propitiate this absurd and ridiculous result by rewarding the Administration for its mistakes.

A major step that must be completed by any applicant to receive any benefit from the Social Security Administration

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[14] See Senate Report 528, July 30 1953; Senate Report 1806, June 23, 1952; Senate Report 1146, July 26, 1955; and Senate Report 1669, May 17, 1950.

and is cited as such in the ALJ's opinion[15] The Government can refuse to pay a claimant prior to his filing an application. Now the same government agency argues that the claimant does not have to apply, he only needs to be determined eligible. This double standard is not consistent with basic principals of equity.

CONCLUSIONS

We find no possible ambiguity in the statute the Administration relies on that could reach such an absurd conclusion, but if one does exist it is clear from the Congressional Record at the time of the passing of the laws in question that the Congress intended that the serviceman

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[15] See Page 1 of Appendix 3: Section 202(a) of the Social Security Act provides, as pertinent here, for the payment of old-age insurance benefits to an individual who is a fully insured individual [as defined by section 214(a)], has attained age 62, and *has filed application for such benefits.* [emphasis added]

was to have the right to choose the plan that was best for him and that once this decision had been made it could not be changed. All other cases in Federal Courts turn on this one point and the United States Supreme Court should resolve the ambiguity the Sixth Circuit opinion in this case will cause.

Respectfully Submitted

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APPENDIX 1

NOT FOR PUBLICATION

91-5514

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
April 6, 1992

ROY H. WARREN Plaintiff-Appellant	)
v.	) ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE
SECRETARY OF HEALTH AND HUMAN SERVICES Defendant-Appellee	)

BEFORE: KEITH, SILER, Circuit Judges, and BERTELSMAN, District Judge* [16]

PER CURIAM: Plaintiff-appellant, Roy H. Warren ("Warren"), appealed from the denial of his claim for social security retirement benefits by the Secretary of Health and Human Services (the "Secretary") pursuant to 42 U.S.C. Secs. 414(a)(1), 417(a) and 20 C.F.R. Sec.

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* The Honorable William O. Bertelsman, Chief Judge United States District Court for the Eastern District of Kentucky, sitting by designation.

404.1342(c). The district court dismissed his complaint, which sought review of the Secretary's decision holding that the Secretary's findings are based on substantial evidence in the record. For the reasons stated below we AFFIRM the district court's dismissal.

I.

Warren served active military duty with the United States Navy during World War II from September 6, 1943, to May 1, 1946. He returned to civilian life and was employed in various positions following the war. In 1951, he began working in a civilian capacity with the United States Air Force and continued to do so until 1971. at that time, Warren was terminated from employment at the United States Air Force Base in

Warner Robins, Georgia because of an injury to his back which had occurred on the job.

On June 1, 1971, an application seeking disability compensation was filed on behalf of Warren with the Office of Federal Employees Compensation of the Department of Labor ("Department of Labor" or "Department"). The disposition of this application turned solely on his civilian service with the Air Force. Because of a delay in the disposition of the disability payments by the Department of Labor, Air Force personnel "improperly arranged" for Warren to begin receiving retirement payments from the United States Civil Service Commission ("Civil Service Commission" or "Commission"). The facts indicate that the Air Force personnel acted independently, and Warren had nothing to do with this retirement claim. The Commission was required to

take into account Warren's wartime service on this claim for retirement benefits.

Warren received payments from the Civil Service commission until September 26, 1972, when the Department of Labor finally approved Warren's claim for disability benefits. The Department of Labor sent Warren $6115.44 as compensation for temporary total disability, and began monthly payments. The Department of Labor also reimbursed the Civil Service Commission for payments in the sum of $6,385.00. This reimbursement was made upon the request of the Commission for payments made to Warren because of the Department's delay in approving his application for disability benefits.

The Department of Labor continued to pay these benefits until March of 1980, when the Department determined that

Warren could not establish that his prior injury continued to result in disability for work or loss of capacity. At this point, Warren apparently applied to the Civil Service Retirement System for retirement income to begin as of March 28, 1980, and these retirement benefits began. These retirement benefits again took due account of his World War II active duty.

The Department of Labor later reinstated his disability compensation benefits and again reimbursed the Civil Service Retirement System for their payments to Warren in the sum of $12,951.33. Warren continues to receive these disability compensation payments, and is eligible to receive the Civil

Service retirement benefits if his disability payments ever cease.

Warren filed an application for Social Security Retirement Insurance Benefits on October 8, 1986. The Secretary's grant or denial of his application turned on whether Warren may receive credit for his time spent on active military duty during World War II. If so, Warren would be entitled to Social Security Retirement Insurance benefits. If Warren is not entitled to use the employment credit for his World War II military service, he has not accrued the requisite time of employment to receive these insurance benefits.

The Secretary denied Warren's application both upon initial application and after an evidentiary hearing. The Secretary concluded that Warren was not entitled to credit for his wartime military service since this credit had

been used in obtaining his Civil Service retirement income. The credit, however, is still available for that use. The district court dismissed Warren's complaint challenging the Secretary's determination finding "that the decision of the Secretary [was] supported by substantial evidence and that there [was] no legal error. This timely appeal followed.

II.

A claimant must attain the age of 62 and have fully insured status in order to qualify for Social Security Retirement Insurance Benefits under 42 U.S.C. sec. 402(a). Fully insured status is established if an individual has credits for the necessary quarters of coverage granted for work covered under the Social Security Act. 42 U.S.C. sec. 414. Warren was born in January 1925 and needs thirty-six (36) quarters of coverage to

meet the statutory definition. Warren has established twenty-eight (28) quarters of credit,

and if his active military service during World War II is credited, he will meet the statutory definition.

A.

Congress intended that veterans of World War II be given credit for earning wages during each month of their active military or naval service. 42 U.S.C. sec. 417(a) provides in pertinent part:

> (1) for purposes of determining entitlement to and the amount of any monthly benefit for any month after August 1950, . . . payable under this subchapter on the basis of the wages and self-employment income of

any World War II veteran, . . . such veteran shall be deemed to have been paid wages (in addition to the wages, if any, actually paid to him) of $160 in each month during any part of which he served in the active military or naval service of the United States during World War II. This section shall not be applicable in the case of any monthly benefit or lump-sum death payment if --

. . .

(B) a benefit . . . which is based, in whole or in part, upon the active military or naval service of such veteran during World War II is determined by any agency or wholly owned instrumentality of the United States (other than the Veterans' Administration) to be payable by it under any other law of the United

States or under a system established by such agency or instrumentality... The Secretary must ascertain whether some other United States instrumentality has determined that a benefit is payable by it. 42 U.S.C. Sec. 417(a)(2). The Secretary will review an application without regard to this provision only if she has no notice after injury that such a benefit is payable. *Id.* However, if the Secretary receives notice from some other agency that "such a benefit is payable by it", the Secretary must then "certify no further benefits for payment or shall re-compute the amount of any further benefit payable . . ."*Id.*

The Secretary has promulgated and administered the following regulation, interpreting this statutory scheme:

> You do not get wage credit for the World War II period if another Federal benefit (other than one

payable by the Veterans' Administration) is determined by a Federal agency of an instrumentality owned entirely by the United States to

be payable to you, even though the Federal benefit is not actually paid or is paid and then terminated, based in part on your active service during the World War II period. ...

20 C.F.R. sec 404.1342 (c) 1988). The regulations make it clear that the benefit must stop or be recalculated upon notification that "a Federal benefit is payable" to the claimant based upon that service. 20 C.F.R. sec 404.2472(a), (b).

Warren argues on appeal that the regulations established by the Department of Health and Human Services interpreting

the federal wage credit statute "are invalid because they do not implement the unambiguous language of the statute that they purport to administer."

Re review the Secretary's decision to deny benefits to determine whether it is supported by substantial evidence, and "and the court shall review only the question of conformity with such regulations and the validity of such regulations." 42 U.S.C. Sec. 405(g). *See also* ***Landsaw v. Secretary of Health and Human services,*** 803 F.2d 211,213 (6th Cir. 1986). We accord deference to an agency's interpretation of a statute that is charged with administering if that interpretation is reasonable. *See generally,* ***Chevron, U.S.A., Inc., v. National Resources Defense Council,*** 467 U.S. 837 (1984).

B.

The Secretary's finding that Warren is not eligible for the war wage credits is certainly supported by substantial evidence. Warren falls squarely within the regulatory language that the Secretary has promulgated. He has received Federal benefits based upon his military service during World War II from the Civil Service Commission on two occasions. Whether he prompted the payments of these benefits is not relevant on the face of the statute or the regulation. Moreover, Warren remains eligible to receive Civil Service Retirement Benefits upon termination of his disability benefits. Accordingly, the Secretary' findings are affirmed based upon the substantial evidence.

C.

On appeal, Warren principally argues that the wage credit regulatory scheme promulgated by the Secretary is invalid because it does not implement the intention of Congress. Warren challenges the regulation because it precludes him from applying the war wage credit to the federal benefit of his choice. He argues that the legislative history behind the statute clearly indicates that Congress intended that veterans have this choice. Warren also contends that it is significant that he did not apply for the benefits, and merely received them as a result of independent government action. Warren contends that the application of the wage credit exception to him in these circumstances contravenes the intentions of Congress and limits his use of the war wage credits unfairly.

The plain language of the war wage credit statutory scheme prevents a claimant from receiving benefits from two federal programs by using the World War II active duty time.[1] On its face, the regulation implements this clear intention of Congress. the touchstone of both the statute and regulation is whether a federal benefit has been deemed "payable" by another federal agency or instrumentality. Neither the statute on its face nor the regulation requires actual payment of the benefit. additionally, the statute and regulation do not inquire as to who applied for the benefit. it is, therefore, irrelevant that Warren did not set into motion the instrumentality that led to his receipt

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[1] It is also plausible that Congress made a statutory choice that as between Social Security retirement insurance fund and some other Federal agency fund a claimant must collect benefits from the latter.

of benefits. Finally, the statute and the regulation do not preclude the claimant from receiving the declared alternative benefit. For example, Warren may still claim against the Civil Service retirement annuity. Accordingly, we conclude that the war wage credit statutory and regulatory schemes utilized by the Secretary are congruous, and reject Warren's challenge to the regulatory scheme.

III.

For the foregoing reasons we **AFFIRM** the ruling of the Honorable Jerome Turner, United States District Justice for the Western District of Tennessee.

APPENDIX 2

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION
November 1, 1989

ROY H. WARREN, Plaintiff,	*	
v.	*	No. 88-2502-TuA
OTIS W. BOWEN, SECRETARY Defendant.	*	

REPORT AND RECOMMENDATION

Plaintiff Roy H. Warren, through council, (hereinafter "plaintiff") has brought this complaint seeking judicial review of a decision of the Social Security Administration, a subdivision of the Department of Health and Human Services (hereinafter "Secretary"), which was adverse to plaintiff's claim for Social Security Retirement benefits. The matter has been referred to the United

States Magistrate for report and recommendation.

ADMINISTRATIVE PROCEEDINGS

On October 8, 1986, plaintiff filed with the Secretary his application for Retirement Insurance Benefits (Transcript of administrative Proceedings, pp. 36-39)[1]. Without working through the Byzantine requirements of the Social Security Act and regulations thereunder, regarding the requirements for plaintiff to be covered and thus to be "fully insured", it is sufficient to

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say that if plaintiff received credit for time spent on active military duty during

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[1] The Administrative Transcript will hereinafter be referred to by page number only.

World War II (in this case from September of 1984 to May of 1946), he would be entitled to early Social Security retirement insurance benefits under his application of October 8, 1986. However, if plaintiff is not entitled to credit for his World War II military service, he would not be entitled to these early retirement insurance benefits.

The evidence disclosed at the hearing[2] before the Administrative Law Judge (hereinafter "ALJ") showed that plaintiff served on active duty with the United States Navy, during World War II, from September 6, 1943, to May 1, 1946 (50).

Plaintiff returned to civilian life, working at various jobs. until on March 31, 1951, he began working, in a civilian capacity, with the United States Air

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[2] Plaintiff was not represented by council at this hearing.

Force (27). He continued in that capacity until 1971 (9). Some time prior to that, plaintiff injured his back while on the job (12, 27). He used up accrued sick leave (30) and was thereafter terminated by the United States Air Force at Warner Robins Air Force base, Georgia (27-28).

Apparently on June 1, 1971, plaintiff (or the United States Air Force filed a claim on plaintiff's behalf. with the office of Federal Employment Compensation of the Department of Labor seeking disability compensation (51). It is to be noted that plaintiff would not need his time served on active duty in World War II to be entitled to disability compensation from the Department of Labor.

According to plaintiff, there was a lengthy delay of the part of the Department of Labor in beginning his disability compensation payments (28). Plaintiff was without money and contacted various Senators for assistance (28).

Apparently plaintiff also complained to the personnel office at Warner Robbins Air Force Base, and they "improperly arranged" for plaintiff to begin receiving retirement pay from the United States Civil Service Commission (6). Plaintiff has insisted that he had nothing to do with this retirement claim, and there is no proof to the contrary. It seems obvious that these individuals at Warner Robins Air force Base were concerned about plaintiff not receiving any money and looking at Civil Service retirement as an alternative.

A claim for retirement benefits for plaintiff from the United States Civil

Service Commission would need to take into account plaintiff's war-time service (15).

Plaintiff continued to receive payments from the Civil Service Commission until September 26, 1972 (54)[3]. Finally the Department of Labor approved plaintiff's claim for disability compensation benefits. Plaintiff was sent $6115.44 as compensation entitlement for temporary total disability and monthly payments were begun. The Department of Labor, at the request of the Civil Service Commission, also paid to them the sum of $6,384.00, representing a refund of the Civil

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[3] Apparently plaintiff receives more per month from his disability claim with the Department of Labor than he does from his retirement from the Civil Service Commission.

Service Commission of payments they made to plaintiff during this waiting

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period (54).

Plaintiff continued to receive his monthly disability benefits from the Department of Labor until on or about March 28, 1980, when the Department of Labor stopped plaintiff's disability compensation benefits on the basis that plaintiff was not able to establish that his prior injury continued to result in disability for work or loss of capacity to earn wages (80).

Plaintiff apparently applied to the Civil Service Retirement System for retirement income to begin as of March 28, 1980, and benefits were commenced (82).

Later the Department of Labor reinstated his disability compensation

benefits (33) and reimbursed the Civil Service Retirement System their payments of $12,951.33 (85). Presumably plaintiff is now receiving his disability compensation payments from the Department of Labor. Also presumably if the Department of Labor ever terminates plaintiff's disability compensation payments, he will be able to resume collecting his retirement income from the Civil Service Retirement System.

RECOMMENDED CONCLUSIONS OF LAW

As previously indicated, on October 8, 1986, plaintiff filed his application for Retirement Insurance benefits under Social Security. This application was denied administratively and after evidentiary hearing because it was concluded that plaintiff was not entitled to credit for his wartime military

service, since he had used this credit in obtaining his Civil Service Retirement income, and it was available for such use.

A World War II veteran is, by statute, generally given credit for earning wages (and thus working necessary quarters for purpose of Social Security retirement insurance income benefits) for active military or naval service during World War II. 42 USC Sec. 417(A)(1).

However, this general rule is not applicable where:

> "...a benefit...which is based, in whole or in part, upon the active military or naval service of such veteran during World War II is determined by any agency or wholly owned instrumentality of the United States (other than The Veterans" Administration) to be payable by it under any other law of the United

States or under a system established by such agency or instrumentality...". 42 USC Sec. 417(A)(1)(B).

The Secretary shall decide an application for Social Security Retirement Insurance benefits by a World War II veteran without regard to Sec. 417(a)(1)(B), unless he or she:

"...has been notified by some other agency or instrumentality of the United States that, on the basis of the military or naval service of such veteran during World War II, a benefit described in...Sec. 417 (a)(1)(B)...has been determined by such agency or instrumentality to be payable by it...42 USC Sec. 417(A)(2).

If the Secretary has not been so notified, he or she:

"...shall then ascertain whether some other agency or wholly owned instrumentality of the United States has decided that a benefit described in (Sec. 417 (a)(1)(B)... is payable by it...42 USC Sec. 417(A)(2).

When the Secretary receives the foregoing certification by some other agency or instrumentality that "such a benefit is payable by it", the Secretary must then "such a benefit is payable by it", the Secretary must then "certify no further

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benefits for payment or shall recompute the amount of any further benefits payable..." 42 USC Sec. (a)(2).

The Secretary, by duly published regulations, has provided an interpretation of this statute.

"You do not get wage credits for the World War II period if another Federal benefit (other than one payable by the Veterans Administration) is determined by a Federal agency or an instrumentality owned entirely by the United States to be payable to you, even though the federal benefit is not actually paid or is paid and then terminated, based in part on your active service during the World War II period..." (emphasis added)

In other regulations, the Secretary makes it clear that benefits are to be recalculated or stopped if the Secretary learn that "a Federal benefit is payable" to a claimant by an agency or instrumentality based upon a veteran's World War II active service. 20 CFR sec. 404.1371 (a), (b), 404.1363.

The ALJ concluded that Plaintiff is "eligible" to receive a Civil Service annuity; that that eligibility takes into account credit for plaintiff's World War II active duty service; and that therefore, under statutes and regulations, plaintiff may not use this World War II active duty service time to obtain Social Security retirement insurance benefits (16). This conclusion was approved by the Appeals council (2-3), thus making it the decision of the Secretary.

Plaintiff has argued that this statute and the regulations are intended to prevent an applicant from using his service time to receive benefits from two Federal programs, and that the Secretary's interpretation would have the effect of

preventing plaintiff from using this service time at all. These claims are, it is submitted, without merit.

While it may be assumed this statute and these regulations were partially intended to prevent an applicant from collecting from two Federal programs by the use of World War II active duty time, it is just as reasonable to assume that the legislative and regulatory intent was to limit claims against the Social Security retirement insurance fund, so that, if a person could conceivable claim against the Social Security retirement insurance fund and also against some other Federal agency's funds, he or she should collect from the latter.

Further, it is simply not true that the action of the Secretary has the effect of preventing plaintiff from using this service time at all. Plaintiff may, if he chooses, claim against his Civil

Service retirement annuity (where his World War II active duty service time is helpful), and, in fact, plaintiff has done so in 1980-1981.

Plaintiff also argues that he never "applied" for active duty service time. According to plaintiff it was erroneous for "the government" to submit an application, on behalf of plaintiff for Civil Service Annuity. Plaintiff does not deny that he asked for these benefits temporarily in 1980-1981.

In any event, it is submitted, the test is not whether plaintiff applied for, and received, benefits from another agency or instrumentality of the United States, which benefits were based in whole or in part on World War II active duty service time. Rather, the test is whether such a benefit "has been

determined by such agency or instrumentality to be payable by it...". 42 USC Sec. 417(a)(2). The Civil Service Retirement System has made such a determination. The statute does not require that payment on such determination be made.

Under these circumstances, it is submitted that the decision of the Secretary is consistent with the language of 42 USC Sec. 417(a), and with his regulations. There is no significant dispute over the facts of this case. Therefore, it is submitted that the complaint by plaintiff should be dismissed.

All parties are advised that all objections to this report and recommendation must be filed within ten (10) days or such objections may be deemed waived by the District Court. Additionally, such a failure to file

within ten (10) days may be treated as a waiver of the right to appeal the District Court"s order hereon. U.S. v Walters, 639 F.2d. 947 (6th.Cir. 1981); Patterson v Mintzes, 717 F.2d. 284 (6th Cir. 1983) Thomas v Arn, 474 U.S. 140, (1985); see also FED. R. CIV. P. 72(b).

Respectfully submitted this 2nd day of October, 1989.

JAMES H. ALLEN

UNITED STATES MAGISTRATE

APPENDIX 3

DEPARTMENT OF
HEALTH AND HUMAN SERVICES
Social Security Administration
OFFICE OF HEARINGS AND APPEALS

DECISION

IN THE CASE OF:	CLAIM FOR:
Ro·· H. Warren (Claimant)	Old-Age Insurance Benefits
(Wage Earner)	415-26-5226 (Soc. Sec. Number)

This case is before the Administrative Law Judge on a request for hearing. The Administrative Law Judge has carefully considered all the documents identified in the record as exhibits, the testimony at the hearing and arguments presented.

ISSUES

The issue before the Administrative Law Judge is whether the claimant is entitled to old-age insurance benefits which depends, in part, on whether he has the

prerequisite quarters of coverage to be fully insured for such benefits. Specifically at issue is whether the claimant's earnings record may be credited with wages for the years 1937-1942 and September, 1943 through May, 1946.

APPLICABLE REGULATIONS AND EVALUATION OF THE EVIDENCE

Section 202(a) of the Social Security Act provides, as pertinent here, for the payment of old-age insurance benefits to an individual who is a fully insured individual [as defined in section 214(a)], has attained the age 62, and has filed application for such benefits.

Section 214(a) of the Act, as pertinent here, defines the term "fully insured individual" as any person who has not less than one quarter of coverage for each calendar year elapsing after 1950 and before the year in which he or she attained age 62.

Section 213(a) of the Act provides, as pertinent here, that the term "quarter of coverage" means, for calendar year before 1978, a calendar quarter in which an individual has been paid $50 or more in wages or has been credited with $100 or more in self-employment income.

Section 213(a) of the Act further provides, as pertinent here, that the term "quarter of coverage" means, for calendar year after 1977, each portion of the total of the wages paid and the self-employment income credited to an

individual in a calendar year which equals the amount required for a quarter of coverage in that calendar year [as determined under subsection (d)]. Subsection (d) provides that for the years prior to 1978, that amount is $50.00.

Section 209 of the Act provides, as pertinent here, that the term "wages" means remuneration for employment.

Section 211(b) of the Act, as pertinent here, provides that the term "self-employment income" means that net earnings from self-employment derived by an individual during any taxable year beginning after 1950, except that such term shall not include the net earnings from self-employment if such net earnings for the taxable year are less than $400.

Section 211(a) of the Social Security Act, as pertinent here, defines the term "net earnings from self-employment" as the gross income, as computed under subtitle A of the Internal Revenue Code of 1954, derived by an individual from any trade of business carried on by such individual, less the deductions allowed under that subtitle which are attributable to such trade or business.

EVALUATION OF THE EVIDENCE

The claimant herein filed an application for retirement insurance benefits on October 8, 1986, and was notified November 28, 1986 that his application was denied because he was hot fully insured due to a lack of sufficient quarters of coverage. Therefore, the issue distills to whether the claimant can be entitled to retirement insurance

benefits and whether her is fully insured.

When the claimant retired from the Air Force in 1972, his military service from September 6, 1943 through May 1, 1946 was used in computing the Civil Service retirement which he began receiving. He subsequently filed for worker's compensation through the Department of Labor and received a higher benefit. Consequently, his Civil Service annuity was terminated and he began receiving worker's compensation benefits. At this point, $6,385.00 was refunded to the U.S. Civil Service Commission.

The claimant is this case contends that he is entitled to have quarters of

coverage derived from his military service credited to his Social Security retirement benefit amount. The Administration holds that the claimant was insured on his Federal employment and "eligible" for Civil Service annuity (disability). In making this computation, his initial pension was based on his military service. The claimant elected to receive worker's compensation through the Department of Labor rather than Civil Service disability. The Department of Labor did not use claimant's military service in the computation. Therefore, the Administration finds that because the claimant was "eligible" for Civil Service annuity with military service credited, he cannot transfer quarters of coverage for computation in his Social Security benefits.

The evidence includes two earnings records which were reviewed by the claimant who stated they were correct as posted except for a period of 1937 through 1942. Because of this dispute, the claimant was given an opportunity to locate evidence during this time which would credit him with additional quarters of coverage. However, he was unable to do so.

Having reviewed the evidence, the undersigned concurs with the Administration's position that, if the claimant were eligible for a Civil Service annuity and he elected to receive a higher benefit from worker's compensation, this would not mean he could credit military service quarters of coverage wherever he decided. Section 404.1342(c) as pertinent herein states that, wage credits for military service

cannot be granted if another Federal benefit is determined by a federal agency to be payable to you, even though the Federal benefit is not actually paid or is paid and then terminated. The undersigned notes that subsequent to receiving worker's compensation benefits, he actually drew his Civil Service annuity. It is further noted that when his worker's compensation benefits ceased for a period, he reverted to Civil Service benefits until the workers's compensation was once again reinstated. Thus, this action clearly demonstrates that the claimant's "eligibility" was always present and therefore, the decision of the Administration is correct.

It is the conclusion of this Administrative Law Judge that the claimant is not fully insured as he lacks

the necessary quarters of coverage and therefore, he is not eligible for retirement insurance benefits.

FINDINGS

After careful consideration of the entire record, the Administrative Law Judge makes the following finding:

1. The claimant filed an application for retirement insurance benefits on October 8, 1986.

2. The claimant requires 36 quarter of coverage for fully insured status.

3. The claimant's earnings record may not be credited with additional wages or quarters of coverage for the years 1937 through 1942 or from

September 6, 1943 through May 1, 1946.

DECISION

It is the decision of the Administrative Law Judge that the claimant is not a fully insured individual and, therefore, is not entitled to retirement insurance benefits for which application was filed on October 8, 1986.

Timothy J. O'Leary
Administrative Law Judge

February 11, 1988
Date

APPENDIX 4

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION
March 22, 1991

ROY H. WARREN, Plaintiff,	*	
v.	*	No. 88-2502-TuA
OTIS W. BOWEN, SECRETARY Defendant.	*	

ORDER ON OBJECTIONS TO THE MAGISTRATE'S REPORT AND RECOMMENDATION

Presently before the court are the plaintiff's objections to United States Magistrate James H. Allen's Report and Recommendation ("Report"). The plaintiff seeks judicial review of an adverse decision by the Social Security Administration ("Secretary") on his claim for social security retirement benefits. The magistrate recommended dismissal of the plaintiff's complaint. This court reviews de novo those matters contained

in the Report of the magistrate to which objection is timely made. A brief statement of the pertinent facts can be found in the magistrate's Report which is incorporated into this Order by reference. The plaintiff's objections will be examined individually.

Objection 1:

The Report relies upon a material factual error.

The Plaintiff alleges that the Report is in error when it states that the plaintiff "apparently applied to the Social Security Retirement[4] System* for retirement income to begin as of March 28, 1980 . . ." (Report, p. 4). The

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* Apparently the term Social Security Retirement System has be substituted for the term Civil Service Retirement System [this note does not appear in the original text]

plaintiff contends that the government, acting on its own erroneously terminated his federal workers's compensation benefits in March 1980 and transferred him to the Civil Service Retirement System. The plaintiff states that he is being "denied social security retirement benefits due to error on the part of the government, and not due to any action on his part."

The court acknowledges that there is no evidence in the record that the plaintiff applied for Civil Service Retirement Benefits in 1980 or at any other time. The magistrate's statement that he apparently applied for Civil Service Retirement Benefits in 1980 is, however, immaterial to the ultimate resolution of the case.

Objection II: The application of 42 U.S.C. Sec. 417(a)(1)(B) to this case constitutes an error of Law.

The plaintiff contends that 42 U.S.C. Sec 417(a)(1)(B) should never have been applied to his case. It was applied, he alleges, through the government's own error which it later acknowledged. The plaintiff further contends that the inappropriate application of the statute, in effect, precludes him from utilizing his in service time in computing his eligibility for social security retirement benefits or any retirement program. The plaintiff states that no valid determination of his eligibility for Civil Service Retirement Benefits has ever been made or sought.

The magistrate submitted that "the test is not whether plaintiff applied

for, and received, benefits from another agency

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or instrumentality of the United states, which benefits were based in whole or in part on World War II active duty service time. Rather, the test is whether such a benefit 'has been determined by such agency or instrumentality to be payable by it. . .' 42 U.S.C. Sec. 417(A)(2)." The magistrate noted that the Civil Service Retirement System had made such a determination and that the decision of the Secretary was consistent with the language of 42 U.S.C. Sec. 417(a) and with his regulations.

The court finds substantial evidence to support the Secretary's position and no legal error and concurs with the decision expressed by the magistrate on this issue. While there is no evidence

that the plaintiff applied for Civil Service Retirement Benefits, a review of the record reveals no evidence that the plaintiff objected to the receipt of Civil Service Retirement Benefits in 1971-72 or in 1980-81 or sought an administrative remedy through the Civil Service Commission. If the Civil Service Commission made an erroneous retirement eligibility determination using the plaintiff's active duty military service to compute the entitlement, the plaintiff can, if possible, seek administrative review and correction within the Civil Service System.

Objection III: The regulation relied upon by the Secretary to preclude plaintiff's receipt of benefits under the Social Security Retirement System contradicts federal law, and is misapplied in this situation.

The plaintiff contends that 20 C.F.R. sec. 404.1342(c) goes beyond the scope of the applicable statute and is inappropriately applied in this case. The regulation states:

3

> You do not get wage credits for the World War II period if another Federal benefit (other than one payable by the Veterans Administration) is determined by a Federal agency of an instrumentality owned entirely by the United States to be payable to you, even though the Federal benefit is not actually paid or is paid and then terminated, based in part on your active service during the World War II period except as explained in Sec. 404.1343.

20 C.F.R. Sec. 404.1342(c)

The court finds 20 C.F.R. Sec. 404.1342(c) to be consistent with 42 U.S.C. Sec. 417 and appropriately applied in this case. Those portions of the magistrate's Report and Recommendation not inconsistent with this Order are incorporated by reference and adopted by the court. The court finds that the decision of the Secretary is supported by substantial evidence and that there is no legal error. The plaintiff's complaint is dismissed.

IT IS SO ORDERED this 21st day of March, 1991.

JEROME TURNER

UNITED STATES DISTRICT JUDGE

Supreme Court, U.S.
FILED
SEP 25 1992
OFFICE OF THE CLERK

No. 92-168

In the Supreme Court of the United States

OCTOBER TERM, 1992

ROY H. WARREN, PETITIONER

v.

LOUIS W. SULLIVAN,
SECRETARY OF HEALTH AND HUMAN SERVICES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

The Social Security Act provides that World War II military service does not count toward eligibility for Social Security benefits if a federal agency has determined another benefit based on military service "to be payable." 42 U.S.C. 417(a)(1)(B). The question is whether Section 417(a)(1)(B) bars petitioner, who received Civil Service retirement benefits based in part on his military service, from counting his military service toward the receipt of Social Security benefits.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 14-29) is unreported. The decision of the district court (Pet. App. 58-65) adopting, with modification, the report and recommendation of the magistrate (Pet. App. 30-46) is also unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 6, 1992. The petition for a writ of certiorari was filed on June 12, 1992. This Court has jurisdiction under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

42 U.S.C. 417(a) provides, in pertinent part:

> (1) For purposes of determining entitlement to and the amount of any monthly benefit for any month after August 1950, or entitlement to and the amount of any lump-sum death payment in case of a death after such month, payable under this subchapter [42 U.S.C. 401 *et seq.*] on the basis of the wages and self-employment income of any World War II veteran and for purposes of section 416(i)(3) of this title [42 U.S.C. 416(i)(3)], such veteran shall be deemed to have been paid wages (in addition to the wages, if any, actually paid to him) of $160 in each month during any part of which he served in the active military or naval service of the United States during World War II. This subsection shall not be applicable in the case of any monthly benefit or lump-sum death payment if—
>
> * * * * *
>
> (B) a benefit (other than a benefit payable in a lump sum unless it is a commutation of, or substitute for, periodic payments) which is based, in whole or in part, upon the active military or naval service of such veteran during World War II is determined by any agency or wholly owned instrumentality of the United States (other than the Veterans Administration) to be payable by it under any other law of the United States or under a system established by such agency or instrumentality.

* * * * *

(2) Upon application for benefits or a lump-sum death payment on the basis of the wages and self-employment income of any World War II veteran, the Secretary shall make a decision without regard to clause (B) of paragraph (1) of this subsection unless he has been notified by some other agency or instrumentality of the United States that, on the basis of the military or naval service of such veteran during World War II, a benefit described in clause (B) of paragraph (1) of this subsection has been determined by such agency or instrumentality to be payable by it. If he has not been so notified, the Secretary shall then ascertain whether some other agency or wholly owned instrumentality of the United States has decided that a benefit described in clause (B) of paragraph (1) of this subsection is payable by it. If any such agency or instrumentality has decided, or thereafter decides, that such a benefit is payable by it, it shall so notify the Secretary, and the Secretary shall certify no further benefits for payment or shall recompute the amount of any further benefits payable, as may be required by paragraph (1) of this subsection.

(3) Any agency or wholly owned instrumentality of the United States which is authorized by any law of the United States to pay benefits, or a system of benefits which are based, in whole or in part, on military or naval service during World War II shall, at the request of the Secretary, certify to him, with respect to any veteran, such information as the Secretary deems necessary to carry out his functions under paragraph (2) of this subsection.

20 C.F.R. 404.1342(c) provides, in pertinent part:

> You do not get wage credits for the World War II period if another Federal benefit (other than one payable by the Veterans Administration) is determined by a Federal agency or an instrumentality owned entirely by the United States to be payable to you, even though the Federal benefit is not actually paid or is paid and then terminated, based in part on your active service during the World War II period[.]

STATEMENT

1. Petitioner served on active duty with the Navy from 1943 to 1946 and was a civilian employee of the Air Force from 1951 to 1971. After he suffered an on-the-job back injury, an application for disability compensation was filed on his behalf with the Office of Federal Employees Compensation of the Department of Labor (DOL). Eligibility for disability compensation turned solely on petitioner's civilian service with the Air Force. During the delay in processing by DOL, petitioner began receiving retirement payments from the United States Civil Service Commission. Pet. App. 15-16. Petitioner testified that he did not initiate a claim for Civil Service retirement benefits, but that Air Force personnel submitted it without his authorization. *Id.* at 34. Petitioner, however, accepted $6,385 in Civil Service retirement benefits, which were based in part on petitioner's military service. *Id.* at 16-17.

Petitioner received retirement payments from the Civil Service Commission until DOL approved his disability claim. Pet. App. 17. At the Commission's request, DOL then reimbursed it for payments the Commission had made to petitioner. DOL continued to pay disability benefits to petitioner until 1980, when it determined that petitioner could not establish that his

prior injury continued to result in disability or loss of earning capacity. Petitioner then began receiving retirement payments from the Commission again.[1] DOL later reinstated petitioner's disability compensation benefits and again reimbursed the Commission for the payments it had made. *Id.* at 17-18.

2. Petitioner filed an application for Social Security retirement benefits in 1986. Pet. App. 19. To qualify, he needed 36 quarters of covered employment. Petitioner had only 28 quarters of covered civilian employment, but more than 36 quarters of employment if his military service was included. *Id.* at 20-21. Petitioner's claim was denied at all administrative levels on the ground that his military service could not be credited for Social Security purposes since it had been used for determining Civil Service retirement benefits. *Id.* at 19-20.

That conclusion was based on 42 U.S.C. 417(a) and 20 C.F.R. 404.1342(c). Section 417(a)(1)(B) provides that military service during the World War II era does not count for purposes of determining Social Security benefits if "a benefit * * * which is based, in whole or in part, upon the active military or naval service of such veteran during World War II is determined by any agency or wholly owned instrumentality of the United States (other than the Veterans Administration) to be payable by it under any other law of the United States or under a system established by such agency or instrumentality." The regulation explains: "You do not get wage credits for the World War II period if another Federal benefit (other than one payable by the Veterans Administration) is determined by a Federal agency or an instrumentality owned entirely by the United States to

[1] The court below found that petitioner "apparently" applied for Civil Service retirement benefits in 1980. Pet. App. 18. Petitioner disputes that finding. Pet. 7-8; see Pet. App. 62-63.

be payable to you, even though the Federal benefit is not actually paid or is paid and then terminated, based in part on your active service during the World War II period." Since the Civil Service Commission had determined that retirement benefits were payable to petitioner, and those benefits were based in part on petitioner's military service during the World War II era, the administrative law judge found that petitioner did not qualify for Social Security retirement benefits. Pet. App. 54-55.

3. After petitioner sought judicial review of the denial of his claim, a magistrate recommended that petitioner's complaint be dismissed. Pet. App. 30-46. The district court agreed. As an initial matter, however, the district court found no evidence to support the magistrate's conclusion that petitioner apparently had "applied for Civil Service Retirement Benefits in 1980." *Id.* at 60. But whether petitioner had applied for Civil Service retirement benefits is "immaterial to the ultimate resolution of the case" (*ibid.*), the court explained: "the test is whether such a benefit 'has been determined by such agency or instrumentality to be payable by it'" (*id.* at 62). Since the Civil Service Commission had determined that a benefit based in part on petitioner's World War II service was "payable by it," the district court concluded that the administrative decision refusing to credit that service for Social Security purposes was consistent with 42 U.S.C. 417(a) and the applicable regulation. The court further found that 20 C.F.R. 404.1342(c) is consistent with 42 U.S.C. 417 and was applied appropriately in this case. Pet. App. 65.[2]

[2] The district court also found no evidence that petitioner had objected to his receipt of Civil Service retirement benefits. It added that "[i]f the Civil Service Commission made an erroneous retirement eligibility determination using the [petitioner's] active duty military service to compute the entitlement, [petitioner] can,

4. The court of appeals affirmed in an unpublished per curiam opinion. Pet. App. 14-29. It found that petitioner "has received Federal benefits based upon his military service during World War II from the Civil Service Commission on two occasions. Whether he prompted the payment of those benefits is not relevant on the face of the statute or the regulation." *Id.* at 26. The appellate court also rejected petitioner's challenge to the regulatory scheme, concluding that "the war wage credit statutory and regulatory schemes utilized by the [government] are congruous." *Id.* at 29.

ARGUMENT

The decision of the court of appeals is correct. Although there is a conflict between the decision below and the Eighth Circuit's 24-year-old decision in *Taylor* v. *Gardner*, 393 F.2d 257 (1968), that conflict does not warrant review by this Court because the question presented is neither significant nor recurring.

1. The court of appeals correctly rejected petitioner's argument that his World War II military service can be used to establish his eligibility for Social Security retirement benefits even though that same service was used to determine his Civil Service retirement benefits. The basis for petitioner's argument is his claim that he did not elect to receive the Civil Service benefits.[3] As the courts below correctly recognized, however, 42 U.S.C. 417(a)(2) makes clear that the relevant question is whether another federal benefit is "payable," not

if possible, seek administrative review and correction within the Civil Service Commission." Pet. App. 63.

[3] As a corollary to that claim, petitioner asserts that the Civil Service benefits were erroneously paid to him. Pet. 6, 8. Nothing in the record supports that assertion.

whether the veteran applied for that other benefit.[4] By its express terms, Section 417(a) provides that World War II military service is not to be counted in determining Social Security eligibility if another "benefit * * *, which is based, in whole or in part, upon * * * [that same service,] is determined by any agency * * * (other than the Veterans Administration) to be *payable by it* under any other law of the United States." 42 U.S.C. 417(a)(1)(B) (emphasis added).[5]

In this case, the Civil Service Commission twice determined that Civil Service retirement benefits were payable to petitioner based in part on his World War II service. Accordingly, petitioner is not entitled to Social Security retirement benefits, whether or not he applied for the Civil Service retirement benefits he received.

2. The decision reached by the courts below is consistent with the decisions of the majority of courts that have addressed the question presented here. *Kindig* v. *Ribcoff*, 202 F. Supp. 198 (E.D. Va. 1962) (former Marine held not entitled to Social Security disability insurance benefits because he had been determined to be entitled to Marine Corps retirement pay, even though he had elected instead to receive compensation from the Veterans Administration); *Morris* v. *Celebrezze*, 238 F. Supp. 717, 719 (E.D.N.Y. 1965) ("[s]ince it is undisputed

[4] In addition to asserting that the appellate court erred by finding that he had applied for Civil Service benefits, petitioner contends that the court's error was material to its holding. Petitioner's contention is meritless. As the court of appeals stated, "[w]hether [petitioner] prompted the payments of these benefits is not relevant on the face of the statute or the regulation." Pet. App. 26.

[5] In contrast to Section 417(a), Section 417(f)(1) expressly permits a surviving spouse or child to make an irrevocable waiver of the right to receive certain annuities. Thus, Congress knows how to write a statute to allow claimants to make a choice of benefits.

that wage credits for this period have been used in computing petitioner's annuity under the Civil Service Retirement Act * * *, the law is clear that petitioner cannot also use these credits for the purpose of receiving Social Security benefits"); and *Sutherland* v. *Flemming*, 189 F. Supp. 712, 713 (N.D. Ala. 1960) ("[t]he fact that a determination was made that the veteran was entitled to the benefit of retirement pay on account of his military service precludes the presumption that he was paid wages during such service"). See also *Moncrief* v. *Folsom*, 233 F.2d 471 (4th Cir. 1956) (holding that Section 417(e)(1)(B), which is similar to Section 417(a)(1)(B), provides that military service that had been considered in determining the amount of the claimant's retirement pay could not be credited for purposes of obtaining benefits under the Social Security Act).[6]

However, as petitioner states, the decision below conflicts with *Taylor* v. *Gardner*, 393 F.2d 257 (8th Cir. 1968). In that case, Taylor transferred to the Fleet Reserve after World War II and began receiving retirement benefits. Fourteen months later he attacked his wife, and she killed him in self defense. She and her disabled daughter later applied for Social Security benefits. The claim was denied on the ground that Taylor's military service could not be used to qualify for Social Security benefits because another benefit had already been determined to be payable based upon that service. A divided Eighth Circuit held that 42 U.S.C. 417(a) did not bar Taylor's military service from counting for Social Security purposes because he had been incompetent when he

[6] Petitioner's assertion to the contrary (Pet. 9-10) notwithstanding, nothing in *Sutherland* or *Moncrief* indicates that those courts considered the election made by the veteran to have any relevance to their decisions.

applied for transfer to the Fleet Reserve, which triggered his receipt of military retirement benefits.

Review is not warranted to consider this conflict. As an initial matter, *Taylor* is an aberration. As the dissent in that case demonstrated, the court's holding is contrary to the plain language of Section 417(a). In the 24 years since *Taylor* was decided, it has not been followed by any other reported decision.

Moreover, the question presented by this case and *Taylor* is unlikely to arise frequently in the future. Section 417(a) is limited to military service between September 16, 1940, and July 24, 1947, a period that closed more than 45 years ago. 42 U.S.C. 417(d).[7] Furthermore, the question presented arises only if a veteran receives some other federal benefit that he did not elect (or was not competent to elect) to receive. That is, petitioner's contention hinges on his claim that he did not elect to receive Civil Service retirement benefits, since it is entirely clear that he would not be able to count his military service toward the receipt of Social Security benefits if he applied for the Civil Service retirement benefits he received. It apparently is quite unusual for a veteran to receive benefits that he did not elect to receive (or was incompetent to elect to receive), and then seek, in effect, to disown those benefits—as the limited number of reported decisions addressing the question presented attest. Accordingly, the conflict between the decision below and *Taylor* need not be resolved by this Court.

[7] A similar provision, 42 U.S.C. 417(e)(1)(B), allows military service between July 25, 1947, and January 1, 1957, to be counted in establishing Social Security eligibility, but that period ended more than 35 years ago.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1992